YAP SEE TECK

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD. AZMI J
[CRIMINAL APPEAL NO. L 125 OF 1980]
19 JUNE 1982

CRIMINAL LAW AND PROCEDURE: *Joint charge - Three accused persons - Offence of gang robbery - Plea of guilty by 1st accused - Convicted and sentenced - Appellant and 2nd accused claimed trial - Found guilty at close of defence - Convicted and sentenced - Whether wrong in law for President to dispose of case against 1st accused immediately - Whether Court should have deferred facts and sentence until after conclusion of trial against appellant and 2nd accused - 1st accused remained in Court during trial of appellant and 2nd accused and became prosecution witness - Effect of remaining in Court.*

The appellant (3rd accused) and two others were charged for 2 different offences under s. 395 of the Penal Code. They were alleged to have jointly committed gang robbery with two others still at large by robbing one Chow Khoo Kiwang on 2 March 1979 at about 4.30 p.m. On the second charge, they were also alleged to have jointly committed gang robbery with two others still at large by robbing one Chong Yoon, a friend of Chow Khoo Kiwang at the same place, date and time. At the commencement of the joint trial, the 1st accused pleaded guilty to both the charges and he was convicted and sentenced to 3 years' imprisonment on each charge to run concurrently. The appellant and the 2nd accused claimed trial and at the close of case for the defence, the learned President found them guilty and on conviction, sentenced the appellant and the 2nd accused each to 5 years' imprisonment on each charge to run concurrently and to 5 strokes of whipping against the appellant. The appellant's appeal to the High Court against conviction and sentence was dismissed.

The only ground of appeal which the learned Judge had considered to have some merit was the argument that the learned trial President had erred in law in proceeding to hear the case against the appellant and the 2nd accused after having accepted the plea of guilty of the 1st accused and after having heard the brief facts of the case and sentenced him. It was the contention of the appellant that the learned President ought to have deferred the facts and sentence against the 1st accused until after the conclusion of the trial against the appellant and the 2nd accused. At the lower Court Counsel for the appellant had applied his case to be heard before another President, but it was rejected. The 1st accused who had pleaded guilty eventually gave evidence for the prosecution.

Held:

[1] Where a co-accused pleads guilty before the commencement of the trial, it is desirable for the Court to enquire whether the prosecution or the remaining co-accused wish to call him as their witness. If either the prosecution or the defence intimated that they wished to do so, it is desirable in the interest of justice that the Court should not postpone sentence, but should proceed to dispose of the case, before removing him altogether from the Court. But if neither party requires him as a witness, sentence should be postponed until after the trial against the remaining co-accused had been completed.

[2] In this present appeal, the 1st accused who pleaded guilty was required by the prosecution and in fact appeared as a prosecution witness. In that event, it was not wrong in law for the learned President to dispose of his case immediately.

[3] The fact that the learned President had recorded the brief facts of the prosecution case would not, in the Court's view, be prejudicial to the appellant, because as correctly stated by the learned President that even if the appellant and the 2nd accused were to be tried before another President, it would still be open to the prosecution to elicit from him the facts of the prosecution case including the fact that he had pleaded guilty to the charge.

[4] In the circumstances, the learned trial President did not err in law in taking the course he did when the 1st accused pleaded guilty. His refusal to allow the application for appellant's case to be heard before another President was also not wrong in law.

[Appeal dismissed.]

Cases referred to:
Toh Ah Loh & Mak Thim v. Rex [1949] MLJ 54
Seet Ah Ann v. PP [1950] MLJ 293
Lee Weng Sang v. PP [1976] 1 MLJ 82

Legislation referred to:
Penal Code, s. 395

For the appellant - Karpal Singh (G. Joseph with him)
For the respondent - Gooi Soon Seng, DPP

JUDGMENT

Mohd. Azmi J:

The appellant (the third accused) and two others (Low Yit San - the first accused - and Chow Soong - second accused) were charged for two offences under s. 395 of the Penal Code. On the first charge, they were alleged to have jointly committed gang robbery with two others still at large by robbing Chow Khoo Kiwang, the proprietor of a Chinese herb shop at 109D, Jalan Sultan, on 2 March 1979 at about 4.30 p.m. On the second charge, they were also alleged with two others still at large to have jointly committed gang robbery by robbing Chong Yoon, a friend of Chow Khoo Kiwang at the same place, date and time. At the commencement of the joint trial, the first accused (Low Yit San) pleaded guilty to both the charges and he was convicted and sentenced to three years imprisonment on each charge to run concurrently. The appellant and second accused (Chow Soong) maintained their plea of not guilty, and at the close of case for the defence, the learned trial President found them guilty; and on conviction, sentenced the second accused to five years imprisonment on each charge to run concurrently, and the appellant to five years on each charge, also to run concurrently and to five strokes of whipping. I dismissed the appeal against conviction and sentence, and I now proceed to give my reasons.

In my view, the only ground of appeal which had some merit was the argument that the learned trial President had erred in law in proceeding to hear the case against the appellant and the second accused after having accepted the plea of guilty of the first accused and after having heard the brief facts of the case and passed sentence on him. In those circumstances, it was the contention of the appellant that the learned President ought to have deferred the facts and sentence against the first accused until after the conclusion of the trial against the appellant and the second accused. From the records, Counsel for the appellant did apply for his case to be heard before another President, but it was turned down. It should be stressed at the outset that the first accused who pleaded guilty eventually gave evidence for the Prosecution as PW8, and the reasons given by the learned President for turning down the appellant's application could be found in the first two paragraphs of his judgment which are now reproduced:

At the outset of the trial, there were three accused persons. The 1st accused pleaded guilty and sentenced accordingly by me. Counsels for 3rd accused then applied for the trial to be proceeded with before another President. I disallowed the application as the facts as given do not implicate 2nd and 3rd accused and the full ingredients of the two charges will have to be fully proved against them. Moreover, the three accused persons were first produced on 12 March 1979 and the case had been postponed once before on 17 December 1979 and fixed for hearing on 5 June 1980. To allow one more postponement, probably to the end of 1980, will cause the hearing of the case, involving an incident that happened on 2 March 1979 to be heard about 1 year 9 months after the incident.

Even if 2nd and 3rd accused are to be heard before another President, there is nothing to stop prosecution from introducing evidence of 1st accused having been convicted for the offences he is charged with and also call 1st accused as a Prosecution witness. Since I was of the view that the trial against 2nd and 3rd accused would in no way be prejudiced by my hearing their case, I commenced hearing of the case against them.

To determine the proper course that should be taken where one of the co-accused has pleaded guilty, it would be of assistance to refer to two cases. In *Toh Ah Loh & Mak Thim v. Rex* [1949] MLJ 54, the two appellants were convicted for being in unlawful possession of 48,952 rounds of ammunition under the Firearms and Ammunition (Unlawful Possession) Ordinance 1946. The first accused pleaded guilty and the trial Judge postponed sentence until after the hearing of the case against the second accused, but he was allowed to remain in Court the whole time and in the course of trial, the first accused was called by the second accused as a defence witness. It was held by the Court of Criminal Appeal that the first accused who pleaded guilty should have been removed not only from the dock but also from the Court. Although the Court held that allowing the first accused to remain in Court was not very material, it was undesirable. I can only infer that sort of practice is undesirable on the ground that it would affect the credibility of the first accused as a witness for the second accused, since he had been allowed to hear evidence given by other witnesses before giving his own testimony. In that case, the appeal by the first accused against sentence was dismissed, but the appeal by second accused against conviction was allowed on other grounds and a retrial was ordered. In *Seet Ah Ann v. PP* [1950] MLJ 293, it was held that the well-established practice in the Criminal Courts in England that a co-accused person is called as a witness only after he has been dealt with for his offence or after he has been acquitted of it should be followed in this country. With respect, I agree with Abott J on this point because, unless the co-accused had been sentenced by the Court, his testimony as a Prosecution or Defence witness would carry very little weight since there is always the strong probability that in giving evidence, particularly for the Prosecution, he would hope for a light sentence or even for the charge against him to be totally withdrawn. It can reasonably be argued that by postponing sentence, the sword of Damocles would be held over his head in order to induce him to give favourable evidence for the Prosecution. Whereas, no such probability can exist once he has been dealt with by the Court.

Having considered the two authorities, it is my view that where a co-accused pleads guilty before the commencement of trial, it is desirable for the Court to enquire whether the Prosecution or the remaining co-accused wish to call him as their witness. If either the Prosecution or the Defence intimated that they wished to do so, I think it is desirable in the interest of justice that the Court should not postpone sentence, but should proceed to dispose of the case, before removing him altogether from the Court. But if neither party requires him as a witness, sentence should be postponed until after the trial against the remaining co-accused has been completed. This would avoid the "awkward situation" that might arise where two accused are charged for committing an offence jointly as envisaged by Hashim Yeop A. Sani J in *Lee Weng Sang v. PP* [1976] 1 MLJ 82. In the present appeal, there were three

persons jointly charged and no "awkward situation" could arise as to whether the remaining two accused had committed the gang robberies jointly as a result of the first accused pleading guilty. Further, in *Lee Weng Sang* case, it would appear that the co-accused who pleaded guilty was not required as a witness and, as such, it was only proper that sentence against him ought to be postponed. But in the present appeal, the first accused who pleaded guilty was required by the Prosecution and did in fact appear as a Prosecution witness. In that event, I hold that it is not wrong in law for the learned President to dispose of his case immediately. The fact that the learned President had recorded the brief facts of the Prosecution case would not, in my view, be prejudical to the appellant, because as correctly stated by the learned President that even if the appellant and the second accused were to be tried before another President, it would still be open to Prosecution to elicit from him the facts of the Prosecution case including the fact that he had pleaded guilty to the charge. Apart from other inconvenience that might arise, I can see no useful purpose in having their case heard before another President. In the circumstances, I hold that the learned trial President did not err in law in taking the course he did when the first accused pleaded guilty. His refusal to allow the application for appellant's case to be heard before another President is also not wrong in law.

For the above reasons, the appeal was dismissed.

Also found at [1983] 1 CLJ 97